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THE THREE AMENDMENTS¹

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A restless doubt begins to be observable in the public mind whether the last three amendments made to the Constitution of the United States do, after all, express the wide, sound policy they were thought to contain. This uneasiness is to be regretted, as it goes to show that public opinion is again becoming variant and wayward, rather than settling down into principles fundamental in our policy. This hesitancy seems to arise from a faulty and conflicting sentiment, South and North, toward the colored race, a sentiment which inclines us to regard negroes as an exception to the rules of government which hold between white men. It has been greatly increased by the errors of reconstruction—errors traceable to other causes, but assumed to inhere in these amendments. As prosperity has returned and increased vigor has spread over the land, there has come with it a revival of earlier feelings; a disposition in the North to settle back into indifference, and in the South to reassert long-cherished social distinctions. These sentiments were many years in formation. The communities subject to them have not been wholly lifted out of them by one violent wrench, and we begin to feel the tendency to slide back into the convictions familiar to us. One feels something of the same solicitude at these rising waves, that comes to the engineer at the first approach of a storm, which threatens to test the strength of a lighthouse just made ready to hold its dangerous position.

¹Although dealing with the civil and political status of the negro in the United States, this paper may appropriately be published in connection with the foregoing addresses dealing with the industrial conditions affecting negro labor. Professor Bascom points out that two requisites must be met if the colored man is to advance: (1) He must be given economic opportunities. "If he is to be pushed aside in favor of white labor, the problem of poverty and social depravity will remain, ready to beget new evils and set up new barriers to growth." (2) The civil and political rights of the negro must not be curtailed because of his race. We must hold to the fundamental principles "that birth brings citizenship and citizenship civil rights, that political rights turn on the ability to use them, this ability resting on tests the same for all."—EDITOR.

The three amendments give distinct statement to principles which our history has labored with from the beginning, and still holds back from their complete enunciation. These amendments betray an anxious state of mind that could not satisfy itself with a simple statement of primary truths, but was still fearful as to the manner in which they might be applied. This hesitancy and apprehension are disclosed in the clause with which each amendment is finished. "Congress shall have power to enforce this article by appropriate legislation." Congress was not willing to rest without an explicit declaration of a power plainly implied in previous sections.

This distrustful state of mind is also seen in the third and fourth sections of the fourteenth amendment. These clauses are not so much a statement of constitutional principles as of specific regulations to be made under them. They are legislative enactments rather than constitutional conceptions. The third clause specifies the conditions under which those who had been in rebellion should be restored to their political rights.

"No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under the State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability."

This was a question on which Congress was feeling its way with much disturbance, yet with much determination, to a policy which should fully secure the fruits of the great sacrifices which had been made in the war. This clause was not so much the enunciation of a principle to guide action in any and every case of rebellion as it was a vindication of legislation which was being framed to close a controversy, the like of which was not expected to recur. Congress felt, in those days of anxiety, that it had to deal both with the present and the future, and must be at liberty to lay secure foundations for a quiet national life. In less dangerous times simple legislation might suffice, but now men looked for a modification of

the organic law which had been for so many years in bitter controversy. Inference and generalities had so often missed their mark that those who were now responsible for the conditions of peace were quite ready to descend to explicit statements.

It may also be doubted whether this clause does not outline a policy unduly severe under the circumstances. Considering human nature and human history, the readjustment of political relations by Congress at the close of the war was considerate and just. Yet a more kindly and wise policy would seem to have been within reach. The history of the past had not been such as to inspire confidence between the two portions of the country. A disagreement on the subject of slavery had led to a misapprehension of character and to many ungenerous feelings. The long and severe conflict had brought into the foreground the immense liabilities and losses of this dissension, and those on whom devolved the settlement of this protracted controversy could not but feel that every possible guarantee for the future should be secured. This led in part to an oversight of the fact that the third section, rigidly enforced, went far to destroy for the time being the political integrity of the South, and to make impossible any adequate collective action either for good or for evil. It is not easy to punish a people, and impossible to punish them and at the same time to expect from them considerate conduct. The material losses of the war could have hardly been made greater short of annihilation. If the North could have regarded this fact as sufficient, and, with more confidence, have rapidly rehabilitated the South with political rights, the conditions of reconstruction would have been far more favorable. In that case the real power and life of the South would have been brought into the foreground. Those would have been occupied with laying anew the foundations of society who were chiefly interested in society and best able to estimate its gains and losses. It is not surprising that this magnanimity of reconciliation was impossible on both sides, but its absence was the great evil of the reconstruction period.

This third section, however, has ceased to have any significance. Events have traveled beyond it, and it simply remains as a mark of the obscure and murky conditions which once prevailed.

The fourth section also pertains to an immediate, practical question—the indebtedness of the two sections.

"The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void."

Though the conditions to which the points raised in this section chiefly apply have passed by, there still remains some vitality in them. Our pension policy covers claims of very different degrees of justice. While a considerable portion of it is a patriotic recognition of fitting claims, another portion can hardly be freed from the charge of unwise concessions for political ends. The history of the Grand Army goes far to confirm the wisdom of those prognostications which resulted in the suppression of the Order of Cincinnati at the close of the Revolution. Though the abuse of pensions has been to the South a grievance, it has called out little criticism. Both the North and the South have accepted it in silence as one of those evils too deeply ingrained in politics to render protest in any degree promising.

When we scale off from the three amendments these adventitious sections, we are impressed with the fundamental character and natural sequence of what remains. The first of the three makes the prohibition of slavery a part of the organic law; the second protects the civil rights incident to this universal freedom; and the third removes from political rights any taint which might attach to race, color or condition of servitude. Emancipation thus became not nominal, but real and complete. The thirteenth amendment was the direct and chief result of the war. No diversity of feeling remains at this point; or, if such feeling remains, it is not of any moment. Though the first and second sections of the fourteenth amendment arise as a direct corollary from the previous amendment, there is in them still the possibility of violent dissent.

I. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any per-

son of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States; or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

Nothing can well be worse than a servile population whose rights are inadequately defined and carelessly guarded. Freedom owes its chief value to civil rights. These rights define the difference between the thrall and the freeman. No more obvious obligation rested on the North than this, that having secured liberty for the negro, it should make sure that the emoluments of liberty went with it. The first clause meets this claim. The blacks born in the United States are citizens of the United States, entitled to all the rights of citizens without equivocation or abbreviation.

The interpretation of this first clause by the Supreme Court gives it a meaning exclusively applicable to the colored race, more so than the language alone seems to imply. The court has held that this section must be interpreted in the light of the circumstances which gave rise to it; that it was not the intent of the amendment to give any new rights to the citizens of the States, but to make the negro a full partaker in these rights. The court went somewhat farther than this, and affirmed that Congress had no right, under this section, to enter the domain of police law in the States, but must satisfy itself with the annulling of any law that disregarded these limitations. The initiative still lies with the States, not with the United States. The office of the latter is simply one of correction.

The second section defines the conditions under which alone political rights can be restricted, and in doing this it gives a strong motive to make the terms of suffrage as free as possible. Citizenship

carries with it civil rights, but not political rights. Indeed, the third clause was inserted expressly to withhold political rights. The doctrine is accepted that political rights are to be bestowed or withheld as those who receive them are prepared to exercise them. They are not like civil rights to be protectively enjoyed, but to be actively exercised. Certain powers are presupposed in them. Different States do not necessarily have the same criteria of these powers. They are left to establish their own criteria, but the political power that they are granted in reference to each other is made to turn on the political power they themselves have recognized in their own concerns. Those who are deprived of political power are not supposed to enlarge the power of those who have deprived them. One who cannot himself exercise political power has none to bestow on others.

This section had a double purpose; it induced the States to establish liberal forms of suffrage, and it put upon a just basis, the representation between the States. This representation had been a standing grievance previous to the war. That a slave should possess neither civil nor political rights, and yet be able to confer political rights on others, was an anomalous state of things. The same act which deprived the slave of power bestowed additional power on the master. The master was left to use the representative capacity of the slave against the slave. That this representative capacity was cut down to three-fifths simply showed how wholly artificial was its character. It would not be fitting that an inequality between the States which was always irritating should again be tolerated. Political power should in every case rest on its own numerical basis.

A little later, when it became plain that the fourteenth amendment was not likely to accomplish its object, and that political rights would be withheld simply on the ground of race, the fifteenth amendment was framed to meet the evil. The general principle of equal rights on which our institutions rest; the plain fact that a portion of the colored race is pre-eminently prepared for suffrage, the especial obligation of the North to watch over the interests of the negro, and the fear which the North felt of leaving any seeds of mischief in the soil, combined to lead to this amendment.

i. "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color, or previous condition of servitude."

This amendment completes the series. The negro as a negro has no longer any barrier placed in his path. He stands on the same footing as his fellow-citizens. The "inalienable rights" of the Declaration of Independence are for the first time recognized. No position short of these three amendments could be logically or safely taken. They do not establish universal suffrage, they simply involve the doctrine that its conditions, whatever they are, shall be the same for all. Men as men shall stand on a fair footing with each other.

Why then does dissatisfaction arise with these amendments which simply place us openly on the principles which, from the very beginning, were thought to inhere in our institutions? It has arisen chiefly out of the difficulties of reconstruction. There was no possibility of an entirely fortunate solution of the problem of reconstruction. Though the war settled and clarified the public mind somewhat, we were still under the accumulated social feelings and political evils which pertained to slavery and were only partially removed by its abolition. These evils had not been escaped, they were to be met and slowly, very slowly, overcome. The expiatory process could not be avoided, and we had neither the wisdom nor the good will nor the patience demanded by it. Much of the old diversity of opinion remained, North and South. The errors which have been committed were so reciprocal, so the fruits of circumstances, and have so acted and reacted on each other to the mutual obscuration of sound opinion, that we have little occasion for recrimination, and much occasion for gratitude that we have emerged from that dark period with growing prosperity and fellowship. To overcome evil with good is a slow process, and seems at the outset to accept the evil at its highest terms. It is the mastery of the mind itself which finally tempers down disaster, and turns it into permanent welfare. When we confronted the question what was to be done with this large dependent class, ignorant and ready to drop into poverty and vice, every mind and every community was searched for its best moral appliances, and some found them in rigorous law and some in gentle persuasives, stimulating hopes and endless waiting.

The North suffered from too little sympathy and too great fear. We had behind us only a melancholy history of inadequate efforts to stem an evil which had always proved too strong for us. The North desired, if possible, a reconstruction which should leave no

room for further trouble. It had had its defeats, delays and disappointments, and it wished an immediate and radical remedy. It held, in a general way, to the principles of the Revolution, but it had never boldly sustained them or found them adequate to its purposes. It was still apprehensive of the indomitable temper of the South, though it had for the moment fought it down. The doctrine of State sovereignty, which had been the evil spirit of the Union from the beginning, once more raised its shaggy locks, now clotted with the carnage of many bloody battles. The United States was conceded sufficient competency to endure the disastrous strife, but not a particle of power with which to exact guarantees for the future. Her resources were like those of Prometheus, able to face pain, but not to correct it. The convention called by the President in South Carolina repealed the act of secession as if it were still a valid law. The States returning to the Union were thought to be in full possession of their former rights. We could win victory, but could not frame peace. The North, with divided counsels, was afraid of itself and afraid of its adversary.

The South, always bold, always unhesitating in its convictions, while compelled to yield slavery, was still disposed to save the wreck. The loss of the battle did not alter its feeling as to the true relations of the races. It was not ready for a future, new in its aims and principles. There was thus the same conflict of opinion in a different, but equally urgent, form to be met. It was impossible that this contention in its present, as in its previous phase, should pass by without grave evils. The North and the South, instructed, but not corrected, in their errors, must encounter as best they were able the obscure and trying experience before them.

The first mistake of reconstruction was that the governments established in the recalcitrant States, resting on a doctrine of perfection applied to most unsuitable material, were left unguided and unrestrained by Congress. Republican institutions, above all institutions, call for watchfulness, many safeguards and a delicate balance of interests. The North, entering on so remote and extreme an experiment, should have given itself no rest in carrying it forward. A military government is a simple thing, but to start free institutions in a chaotic social state, associated with extreme industrial depression, and the deepest possible division of interests, was an undertaking quite beyond human power. The only apology for

so crude an effort was that the North was at its wit's end. No safe path seemed to lie before it. The response that this labor should have been passed over to the South itself is one readily made, but one not at the moment promising success. The South was no more prepared for wise action than was the North. If the South had been ready to rehabilitate the States under admissible principles of liberty, the North would have been inexcusable in preventing it. But this was not the attitude of the South. Under the guidance of the President they had an opportunity to show their hand. The result was a black code, which laid heavy stress on the servile condition of the negroes, guarded carefully against it with penalties that were sure to be abused, and which were accompanied with no provision for progress, no recognition of political rights. The old idea of rule by force prevailed throughout, such a rule as that expressed in Georgia by the chain gang. In South Carolina, Governor Orr, General Hampton and others were said to favor restricted political rights. If this temper, or any temper its equivalent, had prevailed in the conventions called to restore State institutions, the case would have been entirely altered. The disposition seemed rather to be to rake together what remained of former sentiments and institutions and build upon them a social system still uninstructed in the principles of liberty. The rights and hopes of the colored race were lightly esteemed. They were ready to sink into a servile state no more consonant with our form of government than slavery itself. Fidelity to the negro, fidelity to itself, fidelity to the future, forbade the North to accept this adjustment. Events which from the beginning of the strife between the two sections had shown themselves so critical, so difficult of management, so readily perverted, would not allow themselves to be slurred over or patched together in this fashion.

A true policy of social growth neither portion of the nation was prepared to conceive or establish. We are only now approaching such a policy, we have not reached it. A distinct and degraded class, severe vagrant laws, lynching, a bitter tyranny of feeling, can never secure social progress. As long as these methods and these ideas are in the foreground, the entail of slavery will rest heavily upon us. What the South has not fully earned in these intervening forty years was, at the period of reconstruction, a very obscure vision in the future. The errors of reconstruction grew out of circum-

stances from which there was no method of immediate escape. The mischief which came from the policy adopted was no more intentional than is the corruption of our large cities a part of the purpose of universal suffrage. The North, undertaking reconstruction at arm's length, was in no condition to devise or apply any other principle than that of manhood suffrage. The military government to which the South reverted, when its own efforts at reconstruction were unsatisfactory, was not much complained of in its administration, and gave little opportunity, when State conventions were called for the formation of constitutions, to devise or apply any test of suffrage but the familiar one of manhood, in frequent acceptance at the North. But conventions elected under this free form of suffrage inevitably made it the basis of the constitutions framed by them. The North has never demanded universal suffrage of any State as a condition of membership in the Union. The three amendments do not call for it. They only enforce the principles of liberty which lie at the basis of our polity as applicable to all citizens under the same conditions. There is nothing in these amendments which is fitted to interrupt the harmony of the two sections, North and South, if only rights, civil and political, are defined by suitable limitations the same for all. They simply shake off every form of servitude and annul every taint of blood.

A difficulty attended on reconstruction which is always closely united with human action, that of a makeshift policy which concedes too much to present embarrassments and attaches too little importance to the conditions of growth. To make way for the future, to look to progress as a correction of evil, is a wisdom rarely attained by us. The passion and prejudice and clamor of the hour are allowed to crowd back the adjustments which just sentiments and far-reaching plans urge upon us. The unduly irritable feeling present to those who controlled reconstruction was evinced in the impeachment of President Johnson. The alarm excited by his action was excessive, and the evils associated with it could have been overcome by milder methods. It belongs to free institutions that more should be expected from them than they are likely to render. They give an opportunity, but they do not necessarily secure its realization. The spirit which is to make these institutions successful remains to be won. The State governments which at length appeared under the protection of Federal authority were out of har-

mony with the constituency which they represented, and could not but produce results very different from those hoped for and intended. By the haste of growth the conditions of growth were embarrassed and lost. If the primary ideas expressed in the three amendments could have been offered to the Southern States, not in their formal, but in their actual force, and been accepted cheerfully by them, while immediate results might not have been all we could wish, they would have prepared the way for a quiet and rapid development in the future. A score of years were consumed in the colliding of hostile interests which would otherwise have found more quickly the path of reconciliation. For this result the South was as much at fault as the North. The conciliation should have been mutual, the concession joint. If, as in the case of President Johnson, Congress was hasty, that haste was not unprovoked. Perhaps a reconstruction, sympathetic, concessive, patient of delay, was not possible. Certainly it was not attained.

We have occasion to congratulate ourselves that the evils developed in reconstruction took on no such violation of fundamental principles as to leave the occasions of strife uncorrected. They were chiefly loss of time and resources. The years that have intervened have been years of true reconciliation and a better grasp of the problem with which we have to deal. That these years of reconstruction should disclose serious differences of opinion was inevitable. The only thing to be escaped at all hazards was a revival of the irrepressible conflict out of which the war sprang. This result would seem to have been proximately attained, and the two sections are better prepared than ever before to seek their own prosperity and the national prosperity along paths fairly open to progress. Our great danger is the formation of a servile class, suffering oppression by the debased sentiment it creates. This danger we have not yet escaped. The problem of dealing with the colored race assumes more varied form and is more mutual than before the war. It was then easy to say that slavery was our embarrassment, and that slavery was confined to the South. The negro race is now spread through the nation, and calls everywhere for a special mode of treatment. On this question the North has strong feeling and somewhat less sympathy than the South. The South has an irresistible pride and fear of social trespass which render its sympathy nugatory. While the race problem is modified in practice by a large variety of senti-

ment, it is mainly to be settled by growth achieved under the general principles of liberty,—the principles embodied in the three amendments. These standing firm, the immense impulse given by our industrial prosperity and the placable temper of our Christian faith will accomplish the rest. The problem resolves itself into one of time. The speedy solutions of violence lead to farther violence, and give rise to a servile state ever sinking into deeper servility. This was the difficulty of slavery: the slaveholder could never be sufficiently protected. Intelligence and virtue and all forms of thrift were constantly getting in the way of obedience. The overcoming of evil with evil is impossible; the overcoming of evil with good is often a slow and wearisome process. The better impulse must have time in which to mature its own fruit; the mistakes of the fire-eater must have time to disclose themselves and to disappear. The better method, whose proofs are found in the slow, unfolding of experience, must be accepted in faith. Some of this process we have seen since the war. If the movement has been slow, if it has shown periods of dangerous reaction, the wiser opinion and the better temper have prevailed. The colored people have gained in intelligence, in resources and in self-reliance. The South is occupied with prosperous industries. These cannot fail to correct the evils of slavery under two conditions: First, these economic interests must include the negro, and include him rewardfully. If he is to be pushed aside in favor of white labor the problem of poverty and social depravity will remain, ready to beget new evils and set up new barriers to growth. The evil logic of oppression will grow with oppression. Second, civil and political rights, the rights which we define and establish in our collective action, must be allowed freely to establish themselves under their own principles on their own basis. Herein is the importance of the three amendments. Our troubles have arisen from the absence in our national counsels of these fundamental convictions; the incompatibility of constrained labor with free institutions; that birth brings citizenship, and citizenship civil rights; that political rights turn on the ability to use them, this ability resting on tests the same for all. No one of these principles can be obscured or reduced without danger. If they all remain, growth is possible under them and will overcome minor difficulties.

There may be no danger that these constitutional safeguards will be withdrawn. More than this is needed; that they receive com-

plete and cheerful acceptance. No evasion is to be thought of, no concession tolerated. Under them each State can shape a policy in accordance with its own conception of its own wants, but the limitations of suffrage must be honestly framed and the results of these limitations on the collective action of the States be cheerfully accepted. In the long contention which preceded the war the difficulty was that we had no common ground of principles on which to base our arguments. The South assumed that property in slaves was as much a right, in the presence of constitutional law, as was the possession of any other form of property. This opinion the North hesitatingly denied. No reconciliation was possible because the division inhered in the starting point. The three amendments reconcile our institutions with the principles of liberty which the founders of the government failed distinctly to enunciate. The least confusion at this point, like the early evasion, will issue in endless difficulty. The theoretical integrity of our institutions must be fully accepted, and be allowed to vindicate itself in the national life. There is sufficient harmony and strength in that life to clear itself the moment it has the field.